Supreme Court of the United States,

OCTOBER TERM, 1905.

EDWIN F. HALE, APPELLANT,
vs.
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York. } No. 340.

ARGUMENT FOR APPELLANT.

MAY IT PLEASE YOUR HONORS:

This is an appeal from an order made by Circuit Judge Wallace dismissing a writ of *habeas corpus* sued out by the appellant, and remanding him to custody. The appellant has appeared before a Grand Jury of the Circuit Court for the Southern District of New York in obedience to a subpœna that directed him to appear and give evidence "in an action therein pending between the United States and The American Tobacco Company and McAndrews & Forbes Company." He was directed also to bring with him a great number of papers, contracts and correspondence—including the contracts and correspondence between McAndrews & Forbes Company and some thirteen tobacco manufacturing concerns, from the incorporation of the McAndrews & Forbes Company to the issuance of the subpœna. Upon his appearance, and before being

sworn, appellant asked that he be informed of the nature of the action with respect to which he had been called to testify—whether it was under any statute of the United States, and if so what, and that he be furnished a copy of the complaint, information or bill of indictment upon which this investigation was based. No response was made to his request and he was required to be sworn. He testified to his name, age, residence and official relation to McAndrews & Forbes Company—he was its Secretary and Treasurer and one of its directors. He was then asked questions leading up to and including the question as to the existence of any arrangement, understanding or agreement between McAndrews & Forbes Company and The American Tobacco Company. He refused to answer these questions because there was no legal warrant for his examination at all, and, moreover, because his answers might tend to criminate him. He was asked if he had produced the papers called for, and said he had not because *first:* it was impossible for him to collect them within the time allowed; *second:* because he was advised by counsel that under the circumstances he was under no obligation to produce them; and *finally*, because they might tend to criminate him. He was told by the Assistant District Attorney that this was a proceeding under the Sherman Act, and that under the Act of 1903 no person could be prosecuted on account of any transaction with respect to which he testified, and the Assistant District Attorney further advised him that it was not the purpose to prosecute him, and that he thereby offered and assured to appellant immunity

and exemption from punishment. Appellant persisted in his refusal. He and his counsel then appeared, with the Grand Jury and the Assistant District Attorney, before Judge Lacombe. It was suggested by the Assistant District Attorney that the proper practice was for His Honor to direct the witness, appellant, to answer the questions and produce the papers. This suggestion was assented to by appellant's counsel and the Circuit Judge gave such direction *pro forma*. Appellant persisted in his refusal and application was made to Judge Lacombe for his punishment for contempt. Acting again *pro forma*, Judge Lacombe adjudged him in contempt and committed him to the custody of the Marshal until he should answer the questions and produce the papers. A writ of *habeas corpus* was sued out returnable before Judge Wallace. After argument Judge Wallace delivered an opinion, which is in the record, and which opinion closes as follows :

"The conclusions thus indicated would ordinarily "lead to an order for the petitioner's discharge; but "the order compelling him to produce the papers alluded "to in the subpœna was made by one of the judges of "this court, and although it was not made under cir- "cumstances which afforded an opportunity for delib- "erate consideration, the manifest impropriety of re- "versing it indirectly in the same court held by a dif- "ferent judge is so great that it ought not to be done "if the only result will be to shift the burden of prepar- "ing a record for a review by a higher tribunal from "the one party to the other. Whether the present de- "cision is in favor of the petitioner or against him, it is

" understood that it will be taken for review to the " Supreme Court and pending that review the petitioner " will not be confined. Under these circumstances an " order will be entered refusing the discharge of the " petitioner."[a]

It is from that order that this appeal is taken.

While it is not in the order that the questions are discussed in the brief, we desire here, with your Honors' permission, to present, in the first place, the contention that appellant should not be required to answer the questions because they tended to criminate him, and he has no immunity from prosecution. We are not now dealing with an auditor, as was the case in *Brown* v. *Walker*,[b] and it seems to us there is no question of the good faith of appellant in pleading his constitutional privilege. He was a director as well as Secretary and Treasurer of one of the corporations that were mentioned in the subpœna as defendants. If it were guilty of a crime, then, in all human probability, he was guilty of a crime, and he was acting only the prudent part in insisting upon his constitutional rights and refusing to testify, unless he could have the assurance of indemnity.

It was of course not sufficient that such assurance be given by the Assistant District Attorney—it must appear that the statute referred to by him, or some other valid statute, gives immunity, and to a witness testifying under those circumstances. Now, the words of immunity of the Act of 1903 are sufficiently broad to give full immunity to those to whom they are applicable at

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a Record, p. 34. *b* 161 U. S., 591.

all. They are taken from the Act of 1893, passed in aid of the Interstate Commerce Law, and had been held in *Brown* v. *Walker* sufficiently broad to be taken as a full substitute for the constitutional protection against compulsory self-incrimination. But the appellant contends that the fullness of the pardon granted by the act will not avail him because it has no application to a witness who testifies only before a grand jury. The Act of 1903 makes an appropriation for the enforcement of the Sherman Anti-trust Act, the anti-trust features of the Wilson Tariff Act, and the Interstate Commerce Act—and as a proviso and in order to compel the testimony of witnesses, even when self-incriminating, there is granted an immunity to witnesses from prosecution on account of any transaction about which they may testify "in any proceeding, suit or prosecution under said acts." A grand jury investigation such as this, and indeed any grand jury investigation, is not a proceeding, suit or prosecution under the Sherman Act, we respectfully submit, with those words construed as they should be construed in the connection in which they are used.

It seems to us clear that in determining whether a witness falls within a class to which the pardon of the statute is applicable, this Court will strictly construe that statute. If it ever becomes necessary for appellant to rely on this pardon, extraordinary in its nature as it is, there will certainly be a strict construction against him. Let us imagine his being indicted in the State Courts of New York, for instance, for violating its anti-trust law—as he may at any time be

indicted—and that he seeks to avail himself of this extraordinary pardon and exemption granted him by Congressional enactment, and can there be a doubt that every intendment, as well as every prejudice, will be against him—and that he will be required to bring himself clearly and undoubtedly within the terms of the Act.

It is not intended here to argue the matter, but we do desire to call to the attention of the Court in this connection the far-reaching and almost startling nature of this exemption and immunity in a case such as this, where the danger to the witness from State prosecution is not merely fanciful and therefore negligible, but very real, and where the value and substance of his immunity depends absolutely on the power of Congress to stay the hand of each State in the maintenance of law and order within its own borders. Congress, under *Brown* v. *Walker*, has perhaps that power, but certainly one who seeks to rely on the Congressional Act to defy the State authorities will be required to bring himself within the Act construed *in strictissimis verbis*. Since the Act will be construed strongly against him when he seeks to rely on it, it ought, in common justice, to be construed strictly in his favor now when it is sought to be made the instrument of compelling him to testify.

So construed, and taking into account the history of the Act, is any investigation before a grand jury a proceeding, suit, or prosecution under the Sherman Law? It seems to be agreed that it is not a "suit"—indeed it is apparent that this Act of 1903, in its use of the word "suit," referred to the "suits" for treble damages authorized by the Sherman Law to be brought

by individuals injured in their business. And, without respect to that, the word "suit" has not technically, nor colloquially, any meaning that includes a grand jury investigation.

Under holdings of this Court a grand jury investigation is just as certainly not a "prosecution," and cases are cited on the brief. Of course it is not a "prosecutions," for the United States Constitution provides for public prosecutions, and grand jury investigations have been always secret. Indeed, it is the province of a grand jury upon a bill of indictment being presented to it to determine whether or not the citizen shall be subjected to the expense and embarrassment of a prosecution, and the prosecution cannot be said to have begun until the indictment has been found—if the indictment is not found the accused can truthfully say he has not been prosecuted.

Circuit Judge Wallace seems to have agreed with us so far, but he expressed—with expressed hesitation and doubt—the feeling that the grand jury's investigation was a "proceeding" under the Sherman law. We respectfully contend that it is not. Proceeding is, as sometimes used, a very broad word, and includes everything included by the words "suit and prosecution"—indeed, it may include any step taken from the time the criminal is first suspected until he is finally hanged. It does not always have such breadth by any means.

In *Post* v. *United States*[a] for instance, an Act of Congress was considered which provided that all criminal proceedings thereafter instituted for the trial of offenses

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[a] 161 U. S., 583.

against the United States in Minnesota should be instituted in the division where the offense was committed. Theretofore proceedings might be taken in any division to punish an offense committed anywhere in the State. It appeared that the defendant was charged with an offense committed outside of the division where he was tried. The grand jury was in session and considered the charge made against the defendant and examined all the witnesses with respect to it before the statute was passed, but returned a bill of indictment after the law had passed and become effective. This Court held that the law was operative on such a case; that, while it was limited to "criminal proceedings" instituted after its passage, it had effect on that case because the submission of a bill of indictment to a grand jury, and the examination of witnesses by the grand jury, are no part of, but precede, criminal proceedings. So State courts—one or two of the cases are cited in the brief—have given to the word "proceedings" a narrower meaning, dependent upon the circumstances surrounding the use of the word.

Now, in the Act of 1903 the word "proceeding" was not used in its broad, and, we might say, unlimited sense—if it had been so used, neither the word "suit" or "prosecution" would have been used. It was not used as a drag-net sort of word—to sweep up the crumbs of meaning left by other words—if it had it would have followed the other two and we would have instead of the group "proceeding, suit or prosecution," the words "suit, prosecution or other proceeding whatsoever."

Indeed it seems to us evident that in its use of the word "proceeding," Congress hadn't in mind a criminal proceeding at all. Just as the word "suit" was used because the Sherman Law gave a "suit" for treble damages to injured individuals, so the word "proceeding" was used because the Sherman Law called the suit in equity that the Attorney General is authorized to bring to enjoin its violation a "*proceedings* in equity."

In 1893 Congress passed the statute to compel witnesses to testify to violations of the Interstate Commerce Act. They were given immunity from prosecution for any act concerning which they might testify before the Interstate Commerce Commission, or "in any cause or proceeding, original or otherwise," growing out of a violation of the Act. It was that statute which in 1896 was considered by this Court in *Brown* v. *Walker*. Counsel and the Court assumed that the proceedings contemplated by that statute included a grand jury's investigation. Such presumption was justified, for the word was apparently used there with a drag-net sense. The purpose of Congress to include grand jury investigations was not discussed—but the inconvenience of perpetuating testimony before a grand jury was urged in the dissenting opinions as a reason why the statute should be held invalid. In 1903 Congress passed the statute now in question. That the draftsman of the Act of 1903 was familiar with the case of *Brown* v. *Walker* is perfectly evident. If he had desired this Act of 1903 to compel the production of testimony before grand juries, is it not singular that he did not adopt the drag-net language that already in

Brown v. *Walker* had been assumed to include grand jury investigation?

The Act of 1903 was passed mainly in aid of the Sherman Law—there was already the immunity statute of 1893 with respect to the Interstate Commerce Law and the Act of 1903 was not needed for it. Two things that its draftsman certainly had before him was the Sherman Law and Brown *v.* Walker. When he came to determine where and under what circumstances witnesses should be forced to testify even to incriminating things, he deliberately left the adjudicated language of *Brown* v. *Walker*, and used the words suggested to him by the Sherman Law—its most prominent remedial feature were the proceedings in equity, so it was provided that in these the witness must testify—next were the suits for treble damages by injured persons, and it was provided that in such suits he must testify—and finally, since the Act provided that its violation should be a misdemeanor, there was also provided that he must testify in criminal prosecutions.

Conceding the power of Congress to force self-incriminating evidence in a grand jury investigation, is it at all unlikely that Congress saw fit not to do so, and purposely used language other than that of the statute considered in *Brown* v. *Walker*. This immunity that is to be the perfect substitute for constitutional protection should be a practical thing. When a man testifies before a commission or a master his testimony is perpetuated; when he is in open court he may have his private stenographer, or friends enough to form a cloud of witnesses. But the grand jury is an ephemeral

thing; it has no records; it has no stenographer; it has no minutes; sometimes no district attorney is before it; it considers many charges—and sometimes, as in this case, matters that are not charges at all; its members disperse to their homes and business and their service in the grand jury room is soon a closed and forgotten incident. These things were considered in *Brown* v. *Walker*, but they were considered on the question of the power of Congress, and we are asking that they be considered now on the question of the meaning and intent of Congress. It would seem to us that it was concluded by Congress that whatever its power, it was its purpose that only when the Attorney-General began his proceeding for injunction; when the injured party began his suit for damages; or when the grand jury found a bill of indictment and said that a prosecution should begin,—that one of the participants in the violation of the Sherman Act should be required to testify. And it would seem to us wise in Congress to so limit the compulsion, whatever power Congress may have had.

It is argued by the Government that such a construction largely defeats the purpose of the statute and should not be adopted—the argument of expediency is put forward. In the first place, we might reply that this is not a Court of expediency, but a Court of Law. In the second place, and recognizing the principle that laws should be so construed—but not added to—as to give them their intended remedial effect, we would call to the attention of the Court that all of the victories for the Government under the Sherman Act have been with-

out the aid of any construction of the Act of 1903 such as the Government here contends for. The Joint Traffic case; the Trans-Missouri case; and the Addyston Pipe and Foundry case—the case last named being one of an industrial combination—were indeed won without the Act of 1903 at all. With great respect, we say that the Government seems to us to have inverted the order of proceedings intended by Congress in the Sherman Law and in the Act of 1903. It was the proceeding in equity that was intended to give the remedy. The crime was only a misdemeanor punishable, so far as a corporation is concerned, only by a fine. Knowing as we do that the subpœna in this case was issued in good faith, we know that the Assistant District Attorney was seeking to punish only the corporation. Is it not strange that he goes to the grand jury first, where the witness can have no counsel; where questions of relevancy cannot be adequately considered. If there does not exist a condition that will enable the Assistant District Attorney to draw a bill in equity and so begin his proceeding; or a condition that, with the prospect of recovering three times his actual damages, does not tempt a private individual to bring suit for a redress of his grievances; or a condition that enables the District Attorney to get a true bill from his grand jury and so institute a prosecution; then surely no condition exists that warrants the Government in asking the Court's aid, to even the thickness of a hair, beyond the letter of the law, construed strictly in favor of the Constitutional rights of appellant.

In the next place appellant contends that this whole

investigation—or, used in its unlimited sense, "proceeding" by, or before, the grand jury—was unauthorized, and that he was not bound to attend, much less to testify and produce papers, because the grand jury was not investigating any charge, it was merely making an inquiry—of which likely it never heard until the appellant came before it—to ascertain if a thorough investigation of the affairs of the two suspected companies would not reveal a crime. Its acts were therefore *coram non judice*, and no one could be held in contempt for refusing to obey its directions.

This is not a formal or technical matter. It is by no means such a question as was presented to this Court in *Frisbie's* case,[a] where the Court held that the absence of the formal endorsement, "A true bill," did not invalidate a bill of indictment, because by custom the necessity for such formalities had been dispensed with. This is a very real, and as it seems to us a very vital question, in the administration of the Federal Criminal Law. Has the grand jury inquisitorial power, or is its jurisdiction limited to the investigation of particular charges?

It will hardly be seriously contended that the grand jury was not in this case attempting the exercise of inquisitorial power; the minutes of the grand jury upon which the adjudication of contempt is based shows not only the substance of no charge, but the existence of none—and surely no presumptions will be indulged against the liberty of the citizen. The sweeping nature of the subpœna *duces tecum* indicates that it was not a

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a 157 U S., 160.

charge that was being investigated but the whole past life of the suspected corporation.

If appellant is right in his view that this attempted exercise of inquisitorial power was beyond the jurisdiction of the grand jury he was justified in declining to answer any question, incriminating or otherwise, although he would not be permitted to inquire into the organization of a *de facto* grand jury, and although, of course, he would not be permitted to refuse to answer because of the insufficiency or informality of a specific charge. Proper jurisdiction is essential before any court, or any arm of the court, such as a grand jury, can require any one to pay the slightest attention to any of its directions or process. This Court said through Mr. Justice Miller in the Fisk case:[a]

> "When, however, a court of the United States "undertakes by its process of contempt to punish "a man for refusing to comply with an order "which the Court had no authority to make, the "order itself being without jurisdiction is void, "and the order punishing for contempt is equally "void."

It doesn't seem to us that the direction of Circuit Judge Lacombe to the witness to answer the questions and produce the papers as directed affects the question at all. In the first place the record fully warrants the statement that such direction was not induced by any such purpose of Judge Lacombe; it was absolutely *pro forma*. In the next place such direction did not embody, nor pretend to embody, any charge—it could not confer

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[a] 113 U. S., 713.

any jurisdiction. At most, and even leaving out of consideration its *pro forma* nature, it was the expression of the opinion of Judge Lacombe that such jurisdiction did exist, and such circumstances, as legally required appellant to answer the questions and produce the papers. That is only the effect of the judgment remanding appellant to custody, and it is from that action that this appeal is taken.

We are necessarily brought, then, to the serious question: Has a federal grand jury inquisitorial power?

It would not be frank to deny that many grand juries have exercised such power. In the State of Tennessee, the legislature may and frequently does, in the statute which creates a crime, provide that with respect to it grand juries shall have inquisitorial power, and the courts of that State have held that with respect to such crimes grand juries have such power, while with respect to all others their power and jurisdiction is limited to the investigation of particular charges. In some other States the laxity of procedure that has grown up and that now has custom for its authority—such as is referred to in the *Frisbie* case—has induced courts to declare—inadvisedly as it seems to us—that, without statute, a grand jury may conduct roving investigations without the pendency of a charge, formal or otherwise. We believe that a consideration of the Government's and appellant's brief will show that our contention is supported by quite as many and quite as well-considered and persuasive authorities as are on the other side, and we even more

firmly believe that considerations other than a mere balancing of adjudications will induce this Court to decide against the existence of this power of general inquisition.

In the first place the Court should note the contrast between the position of the grand jury according to the conception of the appellant, and its position according to the conception of the Government. We believe that the grand jury is a part of the judiciary; that it was designed for the protection of the citizen. A famous essay was written in the 18th century by the great Lord Chancellor Somers, entitled "The Security of Englishmen's Lives; or the Trust, Power and Duties of Grand Juries in England," and in that essay as everywhere, down to and including the Constitution of the United States, it is assumed or asserted that the institution of the Grand Jury is for the protection of the citizen. No citizen, provides our Constitution, shall be subject to the expense, the inconvenience, the embarrassment and the publicity of a prosecution for an infamous crime except upon the indictment of a grand jury.

The Government on the other hand seems to have the theory that the grand jury is a part of the police department. It is organized into something resembling a detective bureau but with infinitely more and more dangerous power than a detective bureau could ever have.

It is our theory that the detection and prosecution of criminals is essentially a duty of the executive department; that when that department reaches the conclu-

sion that a crime has been committed and that a particular individual is guilty, the law, out of tender consideration of the rights of the citizen, and recognizing too that the ardor of investigation and pursuit has perhaps rendered the police department incapable of weighing judicially the probabilities, requires the action of a grand jury.

We believe our conception is the right one. First, it was unquestionably the old, common-law conception; the common law grand jury was the one referred to by our Constitution and its jurisdiction has never been attempted to be enlarged by Congressional enactment. The authorities cited in the brief, and the *Frisbie* case which is the chief reliance of the Government, show that at common law, and in the olden time grand juries were authorized only to pass upon indictments given them in charge by the King's Solicitor, and make presentments of matters within their knowledge. In the discharge of this last duty they were not permitted to summon or examine witnesses. The formalities have in our more hurried days been dispensed with—the formal bill of indictment is frequently not drawn at all until after the grand jury has acted—just as in some courts oral pleadings are allowed in civil actions—and it is to matters such as these that *Frisbie's* case refers. But the hurried times we have fallen upon, and the power of custom, have not operated to change the very character and jurisdiction of the grand jury. A charge—formal or informal—is the basis of its jurisdiction. It was in this case not investigating a charge at all, but having an inspection of all the papers of a corporation,

and having its Secretary present to explain them—it was seeking information as to whether or not it had committed some offense.

Again, we have said that Congress has not enlarged the power of grand juries so as to make them inquisitors. Is it not evident that Congress cannot constitutionally do so? Grand juries are only a part of the Circuit and District Courts respectively, and the power conferred on the courts of the United States by the Constitution is judicial. Judicial action is judging—and not detective work; the weighing—not procuring—testimony. There must be a plaintiff or complainant—who in any orderly grand jury proceeding is the United States; there must be a defendant—who is the party charged; and there must be a cause of action—the charge, whether formally or informally made. We submit that Congress could not, and has never attempted, to create a body so dangerous in its nature as a grand jury according to the conception of the Government would be—a body having the duty to ferret out crime after the order of a secret service organization, and with the power of a court to compel the attendance of witnesses, and the production of books and papers. Such a body, with such a mixture of the duty of police investigation and the power of judicial force and compulsion over citizens, makes us think of some Continental countries, perhaps, but not of England or America.

Finally, this Court while it has not expressly denied the existence of the inquisitorial power of grand juries has, it seems to us, clearly intimated that they have no

such power. In a very recent case[a] the Court speaking through Mr. Justice Brewer said:

> "The grand jury is a body known to the "common law, to which is committed the "duty of inquiring whether there be probable "cause to believe the defendant guilty of the "offense charged."

In *Counselman's case*[b] there is a very strong intimation by this Court against the inquisitorial authority of grand juries. In that case it had been argued by both Mr. Carter and Mr. Jewett, who represented the witness, that the reports of the grand jury in showing that it was investigating and inquiring into certain alleged violations of the Interstate Commerce Act by the officers and agents of three specified roads, did not suffice to show that it had jurisdiction. Of course their main argument was on the question that has made the case a famous one, to wit: the inadequacy of the immunity statute then considered. The Court decided the case in favor of the witness on the inadequacy of the immunity statute, but said:

> "But in the view we take of this case, we do "not find it necessary to intimate any opinion "as to that question in any of its branches, or "as to the question whether the reports of the "Grand Jury, in stating that they were engaged "in investigating and inquiring into certain "alleged violations of the Acts of 1887 and 1889 "by the officers and agents of three specified "railway and railroad companies, and the offi-

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[a] Beavers v. Henkel, 194 U. S., 73. [b] 142 U. S., 547.

" cers and agents of various other railroad com-
" panies having lines of road in the district (there
" being no other showing in the record as to
" what they were investigating and inquiring
" into), are or are not consistent with the fact
" that they were investigating specific charges
" against particular persons; because we are of
" the opinion that upon another ground the
" judgment of the Court below must be re-
" versed."

In view of these distinct intimations, we feel justified in the belief that this Court will confine the jurisdiction of a grand jury to its judicial functions—to acting as arbitrator between the accuser—the executive—the police department—and the accused; and not add the grand jury, with its enormous judicial power, to the force of agents and counsel whose duty it is, under the Act of 1903, to ferret out breaches of the Sherman Law, if such exist.

In the last place, we contend confidently that this order for the production by their official custodian of a mass of the books and papers of McAndrews & Forbes Co., was an attempt to make an unreasonable and unwarranted seizure and search and was in violation of the Fourth Amendment. We do not intend, here, to go into any historical review of the Fourth Amendment, although some attempt is made to do so in appellant's main brief. It suffices to say, that we owe it—as most of our other Constitutional provisions for the protection of personal liberty—to England. Its principle became fully engrafted upon the unwritten

Constitution of England in 1765 in *Entick's*[a] case—Lord Camden's judgment in that case is termed by Mr. Justice Field of this Court, "one of the landmarks of English liberty." *Entick's* case was for trespass against four King's Messengers for entering his dwelling house and examining his papers. In Lord Camden's judgment the search was denounced as illegal. This case, being connected as it was with the prosecution of Wilkes for libel, was one of the noted cases of its time, and, to again quote Mr. Justice Field, was "welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country." It was certainly known to and in the minds of the framers of the Fourth Amendment to our Constitution, and they reduced the doctrine of that case to definite words: "The right of the people to be secure in their persons, "houses, papers and effects against unreasonable "searches and seizures shall not be violated."

It is settled by *Boyd's* case[b] that an unreasonable order to produce books and papers is just as certainly, as it is just as effectively, an unreasonable search and seizure as if the officers of the law went into—or even broke into—the house of the party to make the search and seizure. In *Boyd's* case there was considered a provision in the customs law that, in certain proceedings for forfeiture, the Court might, on petition of the District Attorney, require the production of the books and invoices of an importer, and in the absence of such production the statements in the petition of the District Attorney, as to the effect of such books and

a 19 How. St. Tri., 1029. *b* 116 U. S., 616.

invoices, should be taken as true. So here, at least equally with *Boyd's* case, there is a search and seizure of the books and papers of the corporation, just as effective and just as offensive as though by the breaking of doors. The official custodian is ordered to produce them for inspection, and not doing so is put into custody, there to remain until he does produce them.

It is our understanding that the Fourth Amendment, so far as it has application to papers and books, has two distinct purposes: One is the protection of the right of privacy; and the other is, as pointed out in *Boyd's* case, to co-operate with the Fifth Amendment in preventing the compulsory production of self-incriminating testimony. Every man, and every association of men, it seems to us, has the right to maintain the privacy of his private papers, and, in order to do so, he is not required to plead that they may tend to criminate him; and their production for inspection is not compelled by ever so many statutes providing immunity from criminal prosecution. This right—as most other private rights—must yield to the public necessity; and one paramount public necessity is the due and orderly administration of justice. So if an issue arises in a court of competent jurisdiction to which my papers—however so private in their nature—are relevant, I may be required to produce them. But the one essential thing to any lawful requirement that I produce them is that they be relevant. The adjudications to this effect, and the cases in which this has been assumed, are too numerous to be cited. In the very recent *Baird* case[a],

[a] 194 U. S., 25.

where the officials of competing Pennsylvania coal roads were required to produce contracts, the very point principally discussed in this Court, and by this Court, was the relevancy of these contracts to the issue there presented. And the issue presented was by a definite charge by petition filed against definite corporations for a definite combination—a charge made with great particularity as to details and circumstances.

What have we in the present case? The corporation is required to expose its entire business life—indeed, an inspection of the subpœna indicates that it will have few if any books or papers left in its office if it complies with this virtual search warrant; they will all be in the grand jury room; and no charge is pending—no issue is raised—nothing exists upon which the Court can even discuss or think about the question of relevancy, much less decide it.

And this is without reference to the fact that this very corporation is the one who is sought to be charged with a crime—if perchance a microscopic investigation of its life, such as no individual will have to stand until judgment day, reveals a crime.

Relevancy is the only justification for forcing the inspection of private papers in a judicial proceeding—and the quality of relevancy is as inconceivable unless there is a charge or allegation or issue upon which the relevancy can be predicated, as is the quality of similarity or dissimilarity without an object to which the comparison is made. Circuit Judge Wallace used strong language, but certainly not too strong, when he said of this subpœna:

> " It falls but little short of being in substance
> " and effect a roving commission devised by the
> " Government to compel a witness to bring be-
> " fore the grand jury a general mass of the
> " private papers of this principal in order that
> " the prosecuting officer might discover whether
> " at any time during the corporate life the prin-
> " cipal had been a party to any act which could
> " afford the basis of a criminal accusation. This
> " was a wanton assault upon the right of
> " privacy, and in my judgment the process in
> " view of the circumstances under which, and
> " the purpose for which, it was issued, author-
> " ized an unreasonable search and seizure of
> " papers within the spirit and meaning of the
> " fourth amendment."

Not only, though, does the Fourth Amendment protect the right of privacy; as thoroughly discussed and demonstrated in *Boyd's* case by Mr. Justice Field, it is also linked with and is in aid of the Fifth Amendment in preventing the compulsory production of self-incriminating evidence. Even if the private papers of this corporation were relevant to a charge or issue, their compulsory production would be in violation of the Fourth Amendment if they tended to criminate the corporation. In *Boyd's* case only one paper was sought, and it was certainly relevant. But its enforced production was unlawful because it was had in order to subject the one producing it to a forfeiture.

Of course there is one adequate answer to this particular contention, as to protection against production of a criminating paper or papers, if the Government makes it and the Court adopts it; that is, that the Act

of 1903 gives immunity to the corporation if under such compulsion as this it produces its papers for inspection —or, what is the same thing, its Secretary is required to tell their contents. This seemed to be Circuit Judge Van Devanter's opinion in the Paper Trust case. Two considerations principally prevent our being satisfied with the view that the corporation obtains immunity: It is evidently not the theory of the Government that the corporation shall obtain immunity; the subpœna shows that appellant's corporation is one of the two parties whom the District Attorney hopes to indict. Then, again, we are afraid that when the corporation claims the immunity because it has through its Secretary produced evidence, courts will—as in all other cases—construe the statute strictly against whomsoever seeks to avail himself of it, and hold against the immunity, not only on the grounds heretofore stated, but also hold that only the person who appeared as a witness and who manually produced the evidence, to wit, the Secretary, has the immunity from punishment. At any rate, and leaving aside the question of an unauthorized encroachment on the corporation's right of privacy, and considering only its right to be protected against the compulsory production of self-incriminating evidence, we earnestly insist that the corporation be not required to make such production, unless and except upon the distinct ground that it has thereby become exempt from punishment—entitled to all the benefits of the Act of 1903.

Now, this is not a case of one party's pleading another's privilege. The corporation can have no pos-

session of papers but by the hands of its officers, and it can claim a privilege only through the mouths of its officers, and the possession by its Secretary of its books and papers in its possession. In his petition for a writ of *habeas corpus*, appellant called attention to the character of his custody of these papers, and pleaded his corporation's rights, as well as his own rights and duties, in the premises. It is his and his corporation's rights that he now insists upon—his corporation speaking through him—the only way it can speak.

There remains the final question—if it is a question—are corporations entitled to the protection of the Fourth Amendment, or is that principle of constitutional law for the benefit only of natural persons? This Court has never had occasion to pass upon the subject. Circuit Judge Van Devanter speaks of it as an undetermined question, but declares his conviction that corporations are under the protection of that amendment as fully as natural persons. In England, where the doctrine was established, corporations are fully entitled to the protection, as shown by cases cited in appellant's brief. In New York and Pennsylvania, the courts have decided that corporations, as well as natural persons, can effectually protest against an unreasonable search of their affairs. Text writers have reached the same conclusions, notably Prof. Wigmore in his recent scholarly work on Evidence.

We have found no authorities against appellant's contention, and on principle it seems to us unquestionably sound. So far as the right to privacy is concerned, we see no reason why the fact that individuals see fit to

carry on certain of their business under legal corporate form should deprive that corporation—and therefore them—of the right of privacy with respect to that business. So far as the right to be protected against the search of papers for the purpose of incrimination is concerned, it seems to us clear that where there exists criminal liability there should exist also the constitutional guarantee against the compulsory production of self-incriminating evidence. And there is a criminal liability against corporations by the very terms of the Sherman Act.

Again, this Court has frequently held that a corporation is a "person" and protected by the Fourteenth Amendment, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It seems to us that the same reasons that induced this Court to hold that corporations are included in the word "person" and are protected against the unlawful acts of States, will induce the holding that they are included in the word "people" and are protected against the unlawful acts or attempts of the Federal Government. The Fourth and Fourteenth Amendments protect rights of the same sort—rights that are the most prized possession of Anglo-Saxons. They are of the kind referred to by Mr. Justice Harlan in the *Hawaiian* case.[a]

"In my judgment neither the life, nor the liberty "nor the property of *any* person within any territory "or country over which the United States is sovereign, "can be taken under the sanction of any civil tribunal

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a 190 U. S., 197.

" acting under its authority by any form of procedure " inconsistent with the Constitution of the United " States."

On account of all these things, as well as others presented in our main brief, we ask that appellant be discharged.